

CASE NO. 16-2297 [Consolidated with 16-3162 and 16-3271]**UNITED STATES COURT OF APPEALS****FOR THE SEVENTH CIRCUIT**

<p>COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE,</p> <p>Petitioner,</p> <p>No. 16-2297 v.</p> <p>NATIONAL LABOR RELATIONS BOARD,</p> <p>Respondent,</p> <p>and</p> <p>HOBBY LOBBY STORES, INC.,</p> <p>Intervening Respondent.</p>	<p>Petition for Review of an Order of the National Labor Relations Board</p> <p>No. 20-CA-139745</p>
<p>HOBBY LOBBY STORES, INC.,</p> <p>Petitioner,</p> <p>No. 16-3162 v.</p> <p>COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE,</p> <p>Intervening Respondent,</p> <p>and</p> <p>NATIONAL LABOR RELATIONS BOARD,</p> <p>Respondent.</p>	<p>Petition for Review of an Order of the National Labor Relations Board</p> <p>No. 20-CA-139745</p>

<p>NATIONAL LABOR RELATIONS BOARD,</p> <p>Petitioner,</p> <p>No. 16-3271 v.</p> <p>HOBBY LOBBY STORES, INC.,</p> <p>Respondent,</p> <p>and</p> <p>COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE,</p> <p>Intervening Petitioner,</p>	<p>Petition for Review of an Order of the National Labor Relations Board</p> <p>No. 20-CA-139745</p>
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APPEAL OF DECISIONS OF NATIONAL LABOR RELATIONS BOARD
363 NLRB No. 195, 20-CA-139745

STATEMENT OF POSITION

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1. This is the Statement of Position filed by the Petitioner in Case No. 16-2297 and Intervenor in Case Nos. 16-3262 and 16-3271 pursuant to this Court's Order, Document 53, dated February 9, 2017. The Petitioner files this Statement of Position in light of the decision of the Supreme Court in the referenced cases.

2. On May 21, 2018, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, No. 16-285, together with its decisions in *Ernst & Young LLP v. Morris*, No. 16-300 and *NLRB v. Murphy Oil USA, Inc.*, No. 16-307, cited as 584 U.S. ____ (2018). The Supreme Court held, contrary to the decision of the National Labor Relations Board ("Board") and two courts below, including this Court in *Epic Systems Corp.*, that the National Labor Relations Act did not prohibit class action waivers in arbitration agreements. The Supreme Court relied on the arbitration policy contained in the Federal Arbitration Act, 9 U.S.C. §§ 2, 3 and 4.

3. Had the Supreme Court ruled otherwise, this would have ended the dispute in this case because the employer's arbitration agreement would have been plainly unlawful under the National Labor Relations Act. The Supreme Court, however, addressed this issue under narrow circumstances. In each of the three cases, at issue was whether the employees could be prohibited from bringing a collective action under the Federal Fair Labor Standards Act, 29 U.S.C. § 216(b). The Supreme Court did not address the myriad other issues that can arise under the circumstances where the employer maintains an arbitration provision that purports to limit the right of employees to bring actions *in fora* other than courts, actions that are not collective or class actions, or many other circumstances of concerted actions concerning work related issues and claims.

4. This case presents many of the issues that the Supreme Court did not touch upon or consider in *Epic Systems*. This Court also did not touch on these other issues in its decision in *Epic Systems*. Those issues were all addressed in the Opening Brief of Petitioner, filed on December 21, 2016.

5. The issues that need to be addressed are stated in the statement of issues presented for review. *See* Opening Br. 1-3, Statement of Issues Presented for Review. Document 41. We quote them in full:

1. Whether the Federal Arbitration Act (“FAA”) applies to this arbitration procedure where there is no showing that there is a contract that affects interstate commerce or a transaction or dispute that affects interstate commerce?

2. Whether the arbitration procedure is unlawful under the National Labor Relations Act (“NLRA”) as applied to the truck drivers employed by Hobby Lobby, who are indisputably exempt from coverage by the FAA?

3. Whether an arbitration procedure that prohibits class actions is invalid because there are other provisions within the arbitration agreement or the company policies that interfere with NLRA § 7, 29 U.S.C. § 157 rights to effectively use the arbitration procedure?

4. Whether an arbitration procedure is invalid under the NLRA because it would prohibit collective actions that are not preempted by the FAA under applicable state law?

5. Whether an arbitration procedure is invalid because it would prohibit group claims that are not class actions, representative actions or other procedural devices available in court or other fora and thus the FAA is not applicable?

6. Whether an arbitration procedure is invalid because it would require employees to resolve disputes through the arbitration procedure rather than through protected concerted activities such as boycotts, strikes and protected, concerted activity?

7. Whether an arbitration procedure is invalid because it interferes with Section 7 claims by foreclosing group claims brought by a union as the representative of the employees?

8. Whether an arbitration procedure that imposes additional costs to employees to bring employment-related disputes is invalid under Section 7 of the National Labor Relations Act?

9. Whether an arbitration procedure is invalid under Section 7 of the National Labor Relations Act because it would prohibit an employee of another employer from assisting a Hobby Lobby employee or joining with a Hobby Lobby employee to bring a claim?

10. Whether an arbitration procedure is invalid because it applies to parties who are not the employer?

11. Whether an arbitration procedure is unlawful because it interferes with the Section 7 rights of employee to act concertedly together to defend claims by the employer against them?

12. Whether the Board improperly prohibited the Committee from presenting evidence to an Administrative Law Judge rather than submitting this on a stipulated record?

13. Whether the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb– 2000bb-4 (“RFRA”) requires that the Board find that the arbitration procedure is invalid under Section 7 because employees have a core religious right of helping other workers?

14. Whether the remedy is adequate?

6. The Board did not address these issues because it relied upon the single argument which the Supreme Court rejected, that all class or collective action waivers are invalid. The issues raised by the Petitioner are now ripe for decision by this Court in light of the decision of the Supreme Court in *Epic Systems*.

7. The Board may suggest that this matter be remanded to the Board for consideration of these issues. We do not anticipate the Board will take that position since it steadfastly ignored those issues in this case. The Board had a full opportunity to rule on these issues because all these issues were addressed in the Cross-Exceptions filed by the Charging Party. *See* J.A. 271-276. The Board's Decision ignored these issues. *See* J.A. 277-293. The Board has refused in this case as it has in other cases to consider other issues relating to these kinds of waivers imposed by employers or contained in arbitration agreements. Remand is inappropriate and this Court should, in the first instance, address these issues.

These issues should be addressed since they all relate in large part to statutory issues framed by other federal statutes or state law. As the Supreme Court made it clear in *Epic Systems*, the Board has no expertise with respect to other federal statutes or state law. This Court will show no deference to the Board's interpretation of other statutes or state law.

8. Two examples from the many issues that must be decided will show the need for briefing and resolution by the Court. Hobby Lobby employs team truck drivers who are transportation workers and not covered by the Federal Arbitration Act. Although the Administrative Law Judge noted this, the Board failed to determine separately if the group waivers violated the Act as to workers not subject to the FAA. J.A. 289.

Similarly, there is a significant issue about whether the Federal Arbitration Act applies to all claims. The Administrative Law Judge recognized this and found

that it did not. J.A. 287-289. The Board did not comment on this. Then, as to those claims that may be made that do not affect commerce nor are governed by the FAA, the FAA does not apply.

Each of these issues is significant. None was considered, presented or remotely resolved by *Epic Systems* in this Court or the Supreme Court.

9. An issue that is unaffected by *Epic Systems* is the unlawful maintenance of a rule that restricted the filing of unfair labor practice charges. J.A. 277. If Hobby Lobby intends to argue that *Epic Systems* governs and that the FAA overrides the NLRA on that issue, that needs to be briefed.

10 One additional point: the Board refers to two class actions that were filed in state court, removed to federal court and then the district courts ordered the claims to arbitration on an individual basis. These cases are a little more complicated than stated in the Board's Decision, Note 3 at J.A. 277. The action in *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070 (E.D. Cal. 2015), was initially filed in federal court and asserted claims under the federal Fair Labor Standards Act and various state law claims. J.A. 323-339. We concede that *Epic Systems* governs the arbitrability of the Fair Labor Standards Act claim. As to the remaining state law claims, the Federal Arbitration Act does not apply absent a showing of effect on commerce. We note that the courts in *Ortiz* and *Fardig v. Hobby Lobby Stores, Inc.*, No. SACV 14-561(ANx), 2014 WL 2810025 (C.D. Cal. June 13, 2014), held that the FAA applied to PAGA claims before this Court rejected that position in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015). *Fardig* involved only state law claims but was removed based on the federal Class Action Fairness Act. The district court then dismissed based on the arbitration agreement. J.A. 316-322. The Board incorrectly states that both were filed in federal court. We suggest that the issue of remedy as to these lawsuits should be left for compliance proceedings assuming the Court finds that the

arbitration agreements invalid in any respect. *See* NLRB Casehandling Manual, Part 3, Compliance Proceedings (June 2018), https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/chm3_0.pdf. This is particularly appropriate since neither case was certified as a class action so the order dismissing each lawsuit was binding only on the named plaintiffs and no one else.

8. It should be clear from a review of the issues raised by the Petitioner that this Court must now address many of those issues. Preliminarily, in *Epic Systems*, all parties assumed that the Federal Arbitration Act applied because what was at issue was a federal claim under the federal Fair Labor Standards Act. Here, to the contrary, there is no claim. In fact, there is no dispute which has arisen except the two lawsuits mentioned above. What is at issue is the maintenance of an overbroad rule before any dispute has arisen. Thus, there are significant questions whether the Federal Arbitration Act applies or whether it can even apply because the lack of a transaction that affects commerce as to all other employees.

9. This Court should therefore set a briefing schedule so these issues may be addressed in light of the Supreme Court's decision in *Epic Systems*. *Epic Systems* does not and cannot resolve all of these issues, although how they are presented to this Court may be changed in light of the Supreme Court's decision in *Epic Systems*.

10. For the reasons suggested above, this Court should set a briefing schedule so that it may address the issues that remain in this case. Since Petitioner has filed its opening brief, the other parties should be required to file briefs. Petitioner will further respond as to how *Epic Systems* affects these issues in

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any reply brief. But, as noted here, we believe it is limited to its facts and is not dispositive of other issues.

Dated: June 19, 2018

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD
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By: /s/ David A. Rosenfeld
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Attorneys for COMMITTEE TO PRESERVE
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CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on June 19, 2018, I electronically filed the foregoing **STATEMENT OF POSITION** with the United States Court of Appeal for the Seventh Circuit, by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Notice of Electronic Filing by CM/ECF system.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on June 19, 2018.

/s/ Karen Kempler
Karen Kempler